IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 14TH AUGUST 2007 / 23RD SRAVANA 1929

CRL.A.No. 1005 of 2007(A)

SC.287/2006 of ADDL. SESSIONS COURT (ADHOC)-II, KALPETTA
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APPELLANT:

VARGHESE, S/O.KALOSE
KOLLIKUNNEL HOUSE, VARAYAR.P.O.,
MANANTHAVADI TALUK, VYANAD DIST.
NOW CENTRAL JAIL, KANNUR

BY ADV. ADV.P.V.VIJAYA KUMAR (STATE BRIEF)

RESPONDENTS:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM

BY PUBLIC PROSECUTORSRI.PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.1005 OF 2007-A

Dated this the 14th day of August, 2007.

JUDGMENT

Appellant is the 2nd accused in S.C.No.287/2006 on the file of the Additional Sessions Judge (Adhoc)-II, Kalpetta. He faced trial for an offence punishable under Section 55 (a) of the Abkari Act along with the 1st accused on the allegation that both the accused were found in possession of 1.5 liters of arrack and two disposable glasses on 23.7.2005 at about 7.05 p.m at a place called C.R.P. Kunnu in Periya village within the limits of Thalappuzha Police Station in contravention of the provisions of the Abkakri Act. To prove the case against the appellant and the other accused, prosecution examined 7 witnesses and relied on Exts.P1 to P7. MOs 1 and 2 were also produced. After closing of the prosecution case, the appellant and the other accused were questioned under Section 313 of the Code of Criminal Procedure. The appellant and the other accused denied the prosecution charge. However, the trial court relying on the evidence adduced by the prosecution found the appellant and the 1st accused guilty under Section 58 of the Abkari Act and they were convicted thereunder and sentenced to undergo

R.I for one year each and also to pay fine of Rs. One lakh each with default sentence of payment of fine, to undergo R.I for three months. The trial court also allowed set off under Section 428 of the the Code. The conviction and sentence ordered against the appellant is challenged in this appeal.

2. Since the appeal is filed through the jail authorities and the appellant is not having a counsel of his own choice, a member from the State brief panel has been appointed to argue the case for and on behalf of the appellant. Heard the learned counsel appearing for the appellant and the Public Prosecutor. The learned counsel appearing for the appellant had taken the following contentions before this Court to challenge the judgment of the trial court. Firstly it is contended that the trial court went wrong in placing reliance on the evidence of Pws 1 and 2, the Police Officials, alone to find the appellant guilty of the charge as the independent witnesses examined by the prosecution did not support the prosecution case at all. Secondly, it is contended that the trial court committed a serious error in finding the appellant guilty under Section 58 of the Abkari Act as there was no evidence before the court to prove that the appellant was found in possession of any

arrack whereas, the charge was that he was found in possession of two disposable glasses. Thirdly it is contended that even if the evidence of Pws 1 and 2 is accepted, the prosecution had not succeeded in proving that the appellant was in physical possession of MO1, from which the sample alleged to have been taken by PW1.

3. Before considering the contentions of the learned counsel, it has to be noted that, as per the prosecution charge, PW1 - the Sub Inspector of Police and the other police officials on getting information that the appellant and the 1st accused were engaged in selling arrack at C.R.P.Kunnu and on reaching that place, PW1 and other police officials have noted that A1 was holding MO1 cannas, which contained 1.5 liters of arrack. Further case of the prosecution is that when the police party reached at the place, the appellant was holding two disposable glasses and the allegation is that both the 1st accused and the appellant were engaged in selling arrack at the place of the incident. The evidence of Pws 1 and 2 would show that the sample alleged to have been taken from MO1 cannas has been got analysed and as per Ext.P7 chemical report it was reported that the sample contained 37.02% and 36.81% of

ethyl alcohol by volume and hence the appellant committed the offence. The trial court relied on the evidence of PW2 – the constable, who accompanied PW1 at the time of detection of the crime. The trial court further relied on the evidence of PWs 3 and 4 – the two Sub Inspectors of Police, who conducted part of the investigation and filed the final charge. The question to be considered in this appeal is whether the prosecution had succeeded in proving that the appellant was found in possession of any arrack and had committed any offence punishable either under Section 58 of the Abkari Act or not. In this context, the charge framed against the appellant and the other accused has to be noted. The charge framed by the court reads as follows:

> "That you on 23.7.2005 by 7.00 p.m was found at C.R.P Kunnu in Periya 39, in possession of 1.5 liters of arrack and two glasses and thereby you have committed the offence punishable u/s.55(a) of the Abkari Act.

4. A reading of the charge itself would show that the appellant was also charged for the possession of 1.5 liters of arrack and two glasses. But if the evidence of Pws 1 and 2 has been analysed, it could be seen that either PW1 or Pw2 had no case that the appellant was in possession of either Mo1 or any arrack which

contained in MO1. The evidence of the two witnesses shows that MO1 cannas, which contained arrack, was in possession of the 1st accused. Even though PW1 had stated before the court that MO2, two disposable glasses, were seized from the appellant and smell was emanating from the glasses but, that fact was not recorded in Ext.P2 mahazar by which MO1 cannas and MO2 glasses were alleged to have been seized by PW1. In Ext.P2 it is only stated that "

There is no other statement regarding speciality of the glasses in Ext.P2. That apart, the prosecution case itself was that PW1 had got information that two persons were engaged in selling arrack at C.R.P.Kunnu. But when they reached at the place, they could seen a building in the open place and the 1st accused was in possession of MO1, which contained arrack. There was no evidence before the court to show that the appellant and the other accused were engaged in selling arrack to anybody or there was no recovery of any money either from the appellant or from the 1st accused.

Though Pws 1 and 2 had a case that both the appellant and the the 1st accused were under the influence of arrack, no evidence has been adduced to prove that allegation. In Ext.P4 thondi list it is specifically stated that "

". There is no other specification of these two disposable glasses. It is also to be noted that when PW1 was cross examined, he had admitted the fact that there was no seal or label on MO2 glasses so as to hold that these glasses were seized from the appellant. Even if these glasses were seized, there was no evidence to show that the appellant was engaged in selling arrack along with the 1st accused and there was no evidence before the court to hold that the appellant was holding any arrack along with A1. In this context, the trial court held in paragraph 14 of the judgment that the circumstances under which the appellant has been found in the company of 1st accused would prove that he was also in joint possession of Mo1.

5. This Court is not in a position to uphold the reasoning of the trial judge regarding joint possession of MO1 with the 1st accused. Even to prove possession of any contraband, it has to be proved that such possessor or the person possessing the

substance should have a control over the said contraband or even he could be with perfect control over such property. In this context, the evidence of Pws 1 and 2 would not show that the appellant has any control over MO1, which contained arrack, as alleged by the prosecution. At the same, the prosecution case was that MO1, which contained arrack, was in the possession of A1 and not in the possession of the appellant. If so, the finding of the trial court that the appellant was in possession of MO1, which contained arrack, is not based on any legally acceptable evidence. Two disposable glasses have been found in possession of the appellant by itself would not attract any offence as contemplated either under Sections 8 or 58 of the Abkari Act. Even if the prosecution could prove that MO1 contained 1.5 liters of arrack, the offence could attract Section 8 and not Section 58 of the Act. In the light of that fact also, the finding entered by the appellant is not sustainable in law.

6. Without considering the other contentions raised by the learned counsel appearing for the appellant, this Court is of the view that the appellant is entitled for clear acquittal of the charge. Accordingly, the appeal is allowed. The judgment of the trial court

is set aside and the appellant, the 2nd accused, in S.C.No.287/2006 on the file of the Additional Sessions Judge (Adhoc)-II, Kalpetta, has to be released forthwith unless he is required to be kept in jail in connection with any other case.

Ordered accordingly.

K. THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

CRL.A.NO.1005 OF 2007-A

JUDGMENT

14th August, 2007.